MERIDIAN ASSET MANAGEMENT SDN BHD v. AMTRUSTEE BHD & OTHER APPEALS

COURT OF APPEAL, PUTRAJAYA
ABDUL WAHAB PATAIL JCA
DAVID WONG DAK WAH JCA
VARGHESE GEORGE JCA
[CIVIL APPEALS NO: W-02-1113-05-2013 & W-02-1156-05-2013 & W-02-1160-05-2013]
26 MARCH 2015

EQUITY: *Fiduciary duty – Breach – Whether fiduciary relationship existed – Appointment of custodian bank by fund manager to safeguard client's money – Whether custodian was a trustee company – Whether owed higher duty to ensure assets of fund manager adequately protected – Whether relationship of 'trusted confidence' existent between client and AmTrustee*

TORT: *Vicarious liability – Apportionment of liability – Appointment of custodian bank by fund manager to safeguard client's money – Breach of duty by custodian bank – Liability of custodian bank towards client – Whether apportionment of liability justified*

TORT: *Negligence – Breach of duty – Duty of fund manager towards client – Whether funds placed with fund manager as 'custodian' of client – Whether client closely and directly affected by fund manager's acts or omissions – Whether duty of care owed – Whether breached duty of care*

Malaysian Assurance Alliance Bhd ('MAA'), now known as Zurich Insurance Malaysia Bhd ('Zurich'), *vide* a letter of authority ('LOA') had appointed Meridian Asset Management Sdn Bhd ('Meridian') as its external fund manager for the purpose of investment of its insurance funds. Meridian, by a custodial services agreement ('CSA'), appointed AmTrustee Bhd to perform custodial and administrative functions in respect of the Zurich insurance funds managed by Meridian. Between 1998 and 2002, a total of RM145 million was placed by Zurich with Meridian. Between 20 June 2002 and 30 December 2004, one Ong Cheng Hoe ('Ong'), then an employee of Meridian, caused to be transferred a total of RM33,248,000 belonging to Zurich to his personal trading accounts with TA Futures Sdn Bhd, a futures broking house ('TA Futures'). He did so by issuing written instruction purportedly from Meridian to AmTrustee to transfer Zurich's funds to his personal trading account in TA Futures. This was accomplished by a cut and paste of the signature the Managing Director of Meridian onto the letter-head of Meridian and faxing the letter to AmTrustee, resulting in 28 transfers. AmTrustee acted on each of the instructions and made the transfers accordingly. However, AmTrustee did not record the transfers in any of its portfolio valuation reports. Instead, as instructed by Ong, the

transfers were recorded as cash placements with Amanah Short Deposits ('ASD'), a financial institution. The actions of Ong were subsequently discovered and thereafter, Ong and two others were tried and convicted by the Sessions Court on charges brought against them for cheating/criminal breach of trust. The appeals herein originated from, *inter alia*: (i) an action by Zurich against AmTrustee for negligence and breach of fiduciary duty; and a third party claim against Meridian, for breach of trust; and (ii) an action by Meridian against AmTrustee, seeking full contribution or indemnity. Meridian, however, did not appeal against the High Court finding that Meridian was vicariously liable for the wrongdoing of its ex-employee, Ong. Zurich appealed against the dismissal of its claim wherein the High Court held that there was no 'breach of fiduciary duty' and/or any 'breach of duty of care' on the part of AmTrustee to Zurich since AmTrustee acted on Meridian's instructions and was reporting to Meridian. It was also observed by the High Court that the loss suffered by Zurich was in any event too remote to be imposed upon AmTrustee and that Zurich had secured a judgment against Meridian for the sum claimed. On the other hand, Meridian appealed (i) against the rejection of its counterclaim for full contribution or indemnity against AmTrustee in respect of the Zurich funds, and granting instead apportionment as between Meridian and AmTrustee in the proportion 60% to 40%; and (ii) against the apportionment by the High Court of liability between Meridian and AmTrustee in the proportion of 60% to 40%. In a civil suit No D5-22-1457-2007, Kumpulan Wang Persaraan (Diperbadankan) ('KWAP'), affected by two wrongful payments out similarly carried out by Ong, the High Court found Meridian vicariously liable for the actions on Ong and entered judgment against Meridian in favour of KWAP.

Held (allowing Zurich's appeal with costs and dismissing AmTrustee's cross-appeal in Civil Appeal No. W-02-1156-05-2013; dismissing Meridian's appeal and AmTrustee's cross-appeal in Civil Appeal No. W-02-1113-05-2013; dismissing Meridian's appeal in Civil Appeal No. W-02-1160-05-2013)

Per Varghese George JCA delivering the judgment of the court:

(1) The statutory requirement to have a custodian bank (an outside party) in a commercial arrangement between a fund manager and their client was obviously to safeguard the assets of the client. It is to ensure another level of client-asset protection beyond the immediate fund manager and is provided for by a specific legislation to that effect. In the instant appeal, AmTrustee and its employees were shown to have full knowledge that the funds placed with AmTrustee as 'custodian' belonged to MAA/Zurich. In the premises, MAA/Zurich was a person so closely and directly affected by AmTrustee's acts or omissions. Hence, even if MAA/Zurich was not strictly a 'neighbour' in law within the relationship in the cases of *Donoghue v. Stevenson* and *Hedley Byrne*

& Co v. Heller & Partners, here, more significantly the relationship was such that it satisfied the three criteria expounded further in *Caparo Industries plc v. Dickman* (*Majlis Perbandaran Ampang Jaya v. Steven Phua Cheng Loon & Ors*). There was definitely a duty of care owed by AmTrustee to Zurich and the relationship centered on Zurich's fund in the hands of AmTrustee, namely applying the 'open-ended approach'. (paras 18, 19 & 21)

(2) As the custodian bank, AmTrustee had a duty to report accurately the movements of MAA/Zurich's funds in the trust accounts such that AmTrustee's reports truly reflected the status of the movement of funds left in the trust account at any given point of time. It defied logic, and reasonableness to construe that any report prepared by AmTrustee for Meridian with respect to MAA/Zurich monies held by AmTrustee as custodian, would not end up with MAA/Zurich and/or it would not be relied upon by MAA/Zurich, *albeit* transmitted through Meridian, the fund manager concerned. As such, AmTrustee had breached the duty of care they owed to MAA/Zurich. (paras 24 & 25)

(3) AmTrustee's attempt to shield themselves behind cl. 13 of the CSA (which provided that AmTrustee was entitled to assume the genuineness of instruction received from Meridian) could not explain away the false reporting by AmTrustee that the monies paid out were invested as cash placements with ASD. It was always open to AmTrustee to refuse to act on any instructions issued by Meridian under the terms of cl. 11 of the CSA, if, in its opinion, any liability may be incurred by AmTrustee to any person and further if in Amtrustee's judgment, any such payment was improper or unauthorised. (paras 27 & 28)

(4) A fiduciary relationship arose where one undertook to act for or on behalf of another in a particular endeavour and it is immaterial whether the undertaking is captured in a contract or not or whether it is gratuitous or assumed without request. The nature of the fiduciary relationship would determine the exact extent and scope of the fiduciary's duty or obligations. Whether a particular set of circumstances ought to attract a fiduciary duty was a question of judicial policy which depended on the standard of commercial morality that the courts of a particular jurisdiction may choose to impose having regard to relevant local considerations. Also to be appreciated was the underlying premise that the imposition of fiduciary obligations arose in equity. (paras 31 & 33)

(5) The appointment of AmTrustee as custodian by Meridian was required (and regulated) by statute to further safeguard MAA/Zurich funds placed with Meridian as fund manager. AmTrustee, at all times, possessed sufficient scope for independent exercise of discretion or

power with respect to instruction related to the known funds of MAA/Zurich within their custody, irrespective of whatever instructions emanating for Meridian thereto. AmTrustee was a trustee company and it owed a higher duty to ensure that the assets of the fund manager's with them were adequately protected and the ultimate beneficiary's interests were not jeopardised. (paras 34 & 35)

(6) AmTrustee stood in the position of a fiduciary directly to MAA/Zurich in respect of MAA/Zurich's funds deposited with AmTrustee as statutory 'custodian' by Meridian. AmTrustee was also not a 'bare trustee'; a charge or commission of 0.02% of the value of each transaction was paid by MAA/Zurich to AmTrustee quite apart from another charge separately imposed and recovered by Meridian from MAA/Zurich. There was, therefore, a relationship of 'trusted confidence' existing between MAA/Zurich and AmTrustee at all material times in the context of the funds of MAA/Zurich handled by AmTrustee as 'custodian'. (para 36)

(7) The duty of care and fiduciary obligation owed to MAA/Zurich had been breached by AmTrustee and damages had ensued to MAA/Zurich. This was adequately borne out by the adjustments made by AmTrustee themselves to their portfolio valuation reports following discovery of the fraud. The Revised Fund Flow Reports in respect of MAA Life Par and MAA Annuity Par Account issued by AmTrustee clearly evidenced the losses occasioned to MAA/Zurich. AmTrustee was therefore severally liable with Meridian for the losses. (paras 38, 39)

(8) Meridian and AmTrustee had a joint, if not complimentary, role or duty to ensure that MAA/Zurich funds were protected and invested to bring in returns for MAA/Zurich. The High Court held that Ong had 'done a lawful act unlawfully' and was vicariously liable for the fraudulent actions attached to Meridian. The court had applied the right principles of law and had directed itself correctly to the facts in issue in the matter. The decision that Meridian was vicariously liable for the unlawful acts of Ong was also consistent to the decision in KWAP's case. (paras 49, 50 & 51)

(9) The 'but for' test with respect to causation/contribution towards the cause of the loss was not the only or exclusive test to be applied. Where multiple factors had brought about the injury (loss) it was the duty of the court to give regard to what material contribution those factors had played separately and apportion responsibility accordingly, so long as it satisfied the overriding test of 'proximate causation'. The High Court had rightly held that where the second instruction from Ong had the effect of cancelling the first instruction and even camouflaging it, AmTrustee and its staff ought not to have been a compliant automaton

doing the bidding of Meridian. The staff of AmTrustee had sensed something was not quite right but had been gullible to accept the explanation of Ong; those staff and other responsible officers ought to have acted responsibly, knowing fully well that the ultimate beneficiary of the funds was MAA/Zurich. (paras 53 & 54)

(10) Therefore, the trial judge did not err and was justified to apportion liability as he did between Meridian and AmTrustee in so far as the losses recoverable by MAA/Zurich and KWAP were concerned. There was also no valid or any sound ground to disturb the rate of apportionment ordered by the trial judge in the matter. (para 56)

Bahasa Malaysia *Translation Of Headnotes*

Malaysian Assurance Alliance Bhd ('MAA'), kini dikenali sebagai Zurich Insurance Malaysia Bhd ('Zurich'), melalui satu surat kuasa ('LOA') telah melantik Meridian Asset Management Sdn Bhd ('Meridian') sebagai pengurus dana luarnya bagi tujuan pelaburan dana insurannya. Meridian, melalui perjanjian perkhidmatan penjagaan ('CSA'), telah melantik AmTrustee Bhd untuk melaksanakan fungsi-fungsi penjagaan dan pentadbiran berkaitan dengan dana insurans Zurich yang diuruskan oleh Meridian. Di antara tahun 1998 dan 2002, sejumlah RM145 juta telah diamanahkan oleh Zurich kepada Meridian. Di antara 20 Jun 2002 dan 30 Disember 2004, Ong Cheng Hoe ('Ong'), pada ketika itu pekerja Meridian, telah mengakibatkan pemindahan sejumlah RM33,248,000 kepunyaan Zurich ke dalam akaun-akaun perniagaan persendiriannya dengan TA Futures Sdn Bhd, firma pembrokeran niaga hadapan ('TA Futures'). Dia berbuat demikian dengan mengeluarkan arahan bertulis kononnya daripada Meridian kepada AmTrustee untuk memindahkan dana Zurich ke dalam akaun perniagaan persendiriannya di TA Futures. Ini dilakukan dengan memotong dan menampal tandatangan Pengarah Urusan Meridian ke atas kepala surat Meridian dan memfakskan surat tersebut kepada AmTrustee, menjurus kepada 28 pemindahan. AmTrustee bertindak terhadap setiap satu arahan dan melakukan pemindahan-pemindahan dengan sewajarnya. Walau bagaimanapun, AmTrustee tidak merekodkan pemindahan-pemindahan tersebut dalam mana-mana laporan penilaian portfolionya. Sebaliknya, seperti yang diarahkan oleh Ong, pemindahan-pemindahan tersebut telah direkodkan sebagai peletakan tunai dengan Amanah Short Deposits ('ASD'), sebuah institusi kewangan. Tindakan-tindakan Ong kemudiannya telah diketahui dan selepas itu, Ong dan dua yang lain telah dibicarakan dan disabitkan oleh Mahkamah Sesyen atas pertuduhan-pertuduhan yang dibuat terhadap mereka bagi penipuan/pecah amanah. Rayuan-rayuan di sini berasal daripada, antara lain: (i) tindakan oleh Zurich terhadap AmTrustee bagi kecuaian dan pelanggaran kewajipan fidusiari; dan tuntutan pihak ketiga terhadap Meridian, bagi pecah amanah; dan (ii) tindakan oleh Meridian terhadap AmTrustee, memohon sumbangan penuh atau indemniti. Walau

bagaimanapun, Meridian tidak merayu terhadap dapatan Mahkamah Tinggi bahawa Meridian bertanggungan secara vikarius bagi salah laku bekas pekerjanya, Ong. Zurich merayu terhadap penolakan tuntutannya di mana Mahkamah Tinggi memutuskan bahawa tidak ada 'pelanggaran kewajipan fidusiari' dan/atau apa-apa 'pelanggaran kewajipan berjaga-jaga' pada pihak AmTrustee kepada Zurich kerana AmTrustee telah bertindak atas arahan Meridian dan melapor kepada Meridian. Juga diputuskan oleh Mahkamah Tinggi bahawa kerugian yang dialami oleh Zurich walau bagaimanapun adalah amat terasing untuk diletakkan terhadap AmTrustee dan bahawa Zurich telah memperolehi penghakiman terhadap Meridian bagi jumlah yang dituntut. Sebaliknya, Meridian merayu (i) terhadap penolakan tuntutan balasnya bagi sumbangan penuh atau indemniti terhadap AmTrustee berkaitan dengan dana Zurich, dan sebaliknya memberikan pembahagian antara Meridian dan AmTrustee dalam pecahan 60% kepada 40%; dan (ii) terhadap pembahagian liabiliti oleh Mahkamah Tinggi antara Meridian dan AmTrustee dalam pecahan 60% kepada 40%. Dalam Guaman Sivil No. D5-22-1457-2007, Kumpulan Wang Persaraan (Diperbadankan) ('KWAP'), yang terjejas oleh dua pembayaran keluar secara salah yang serupa yang dilakukan oleh Ong, Mahkamah Tinggi mendapati Meridian bertanggungan secara vikarius bagi tindakan-tindakan Ong dan memasukkan penghakiman terhadap Meridian bagi pihak KWAP.

Diputuskan (membenarkan rayuan Zurich dengan kos dan menolak rayuan balas AmTrustee's dalam Rayuan Sivil No. W-02-1156-05-2013; menolak rayuan Meridian dan rayuan balas AmTrustee dalam Rayuan Sivil No. W-02-1113-05-2013; menolak rayuan Meridian dalam Rayuan Sivil No. W-02-1160-05-2013)

Oleh Varghese George HMR menyampaikan penghakiman mahkamah:

(1) Keperluan statutori untuk mempunyai bank penjaga (pihak luar) dalam pengurusan komersial antara pengurus dana dan pelanggan mereka adalah jelas untuk melindungi aset-aset pelanggan. Ia adalah untuk memastikan satu lagi peringkat perlindungan aset-pelanggan melangkaui pengurus dana dan ia diperuntukkan oleh perundangan spesifik bagi tujuan tersebut. Dalam rayuan ini, AmTrustee dan pekerja-pekerjanya telah ditunjukkan mempunyai pengetahuan penuh bahawa dana-dana yang ditempatkan dengan AmTrustee sebagai 'penjaga' adalah kepunyaan MAA/Zurich. Dalam keadaan tesebut, MAA/Zurich adalah pihak yang sangat hampir dan terjejas secara langsung oleh tindakan-tindakan atau peninggalan-peninggalan AmTrustee. Oleh itu, walaupun MAA/Zurich bukan secara ketat, 'neighbour' dari segi undang-undang dalam ruang lingkup hubungan dalam kes *Donoghue v. Stevenson* dan *Hedley Byrne & Co v. Heller & Partners*, di sini, lebih penting lagi hubungan tersebut telah memenuhi kriteria yang dikemukakan selanjutnya dalam kes *Caparo Industries plc v. Dickman* (*Majlis Perbandaran Ampang Jaya*

v. Steven Phua Cheng Loon & Ors). Sememangnya terdapat kewajipan berjaga-jaga oleh AmTrustee kepada Zurich dan hubungan tersebut tertumpu kepada dana Zurich dalam pegangan AmTrustee, iaitu menggunapakai 'pendekatan terbuka'. A

(2) Sebagai bank penjaga, AmTrustee mempunyai kewajipan untuk melaporkan secara tepat penjalanan dana MAA/Zurich dalam akaun amanah tersebut di mana laporan AmTrustee jelas menggambarkan status penjalanan baki dana dalam akaun amanah pada setiap masa. Adalah tidak munasabah untuk mentafsirkan bahawa apa-apa laporan yang disediakan oleh AmTrustee untuk Meridian berkaitan dengan wang MAA/Zurich yang dipegang oleh AmTrustee sebagai penjaga, tidak akan sampai kepada MAA/Zurich dan/atau ia tidak akan disandarkan oleh MAA/Zurich, meskipun dipindahkan melalui Meridian, pengurus dana yang berkaitan. AmTrustee telah melanggar kewajipan berjaga-jaga mereka terhadap MAA/Zurich. B C

(3) Cubaan AmTrustee untuk melindungi diri mereka di belakang kl. 13 CSA (yang memperuntukkan bahawa AmTrustee berhak untuk menganggap kesahihan arahan yang diterima daripada Meridian) tidak boleh menjelaskan laporan salah oleh AmTrustee bahawa wang yang dibayar keluar dilaburkan sebagai penempatan tunai dengan ASD. Adalah sentiasa terbuka kepada AmTrustee untuk menolak untuk bertindak atas apa-apa arahan yang dikeluarkan oleh Meridian di bawah terma-terma kl. 11 CSA, jika, pada pendapatnya, apa-apa liabiliti akan ditanggung oleh AmTrustee kepada mana-mana pihak dan jika pada pertimbangan AmTrustee, bayaran sedemikian adalah tidak wajar atau tidak dibenarkan. D E F

(4) Hubungan fidusiari timbul di mana seseorang mengaku janji untuk bertindak untuk atau bagi pihak seorang lagi dalam sesuatu hubungan dan adalah tidak penting sama ada akujanji tersebut dimasukkan dalam kontrak atau tidak, atau sama ada ia adalah secara percuma atau dianggap, tanpa permintaan. Sifat hubungan fidusiari akan menentukan peringkat dan skop sebenar tugas dan kewajipan fidusiari. Sama ada sesuatu set keadaan wajar menarik kewajipan fidusiari adalah persoalan polisi penghakiman yang bergantung kepada standard moral komersial yang mahkamah dalam bidang kuasa tertentu mungkin memilih untuk mengenakan bergantung kepada pertimbangan tempatan yang relevan. Asas bahawa pengenaan kewajipan fidusiari timbul dalam ekuiti juga perlu dipertimbangkan. G H

(5) Pelantikan AmTrustee sebagai penjaga Meridian adalah diperlukan (dan dikendalikan) oleh statut untuk melindungi selanjutnya dana MAA/Zurich yang disimpan dengan Meridian sebagai pengurus dana. AmTrustee pada setiap masa, mempunyai skop yang mencukupi bagi I

pelaksanaan budi bicara atau kuasa persendirian mengenai arahan berkaitan dengan dana MAA/Zurich yang diketahui dalam kawalan mereka, tanpa mengira apa-apa arahan yang timbul daripada Meridian. AmTrustee adalah syarikat amanah dan ia mempunyai kewajipan yang lebih tinggi untuk memastikan bahawa aset-aset pengurus dana yang ada pada mereka dilindungi dengan secukupnya dan kepentingan benefisiari utama tidak terjejas.

(6) Dalam keadaan tersebut, AmTrustee berada dalam kedudukan fidusiari secara langsung kepada MAA/Zurich berkaitan dengan dana MAA/Zurich yang didepositkan dengan AmTrustee sebagai 'penjaga' statutori oleh Meridian. AmTrustee juga bukan 'bare trustee'; caj atau komisyen sebanyak 0.02% bagi nilai setiap transaksi dibayar oleh MAA/Zurich kepada AmTrustee selain daripada caj lain yang berasingan yang dikenakan dan diperolehi oleh Meridian daripada MAA/Zurich. Oleh itu, terdapat hubungan 'keyakinan yang dipercayai' yang wujud antara MAA/Zurich dan AmTrustee pada setiap masa material dalam konteks dana MAA/Zurich yang dikendalikan oleh AmTrustee sebagai 'penjaga'.

(7) Kewajipan berjaga-jaga dan kewajipan fidusiari kepada MAA/Zurich telah dilanggar oleh AmTrustee dan ganti rugi yang timbul kepada MAA/Zurich. Ini telah dibuktikan dengan secukupnya melalui pelarasan yang dibuat oleh AmTrustee sendiri kepada laporan penilaian portfolio mereka berikutan penemuan fraud tersebut. Laporan 'Revised Fund Flow' berkaitan dengan Akaun MAA Life Par dan MAA Annuity Par yang dikeluarkan oleh AmTrustee jelas membuktikan kerugian yang berlaku kepada MAA/Zurich. AmTrustee oleh itu bertanggungan secara berasingan dengan Meridian bagi kerugian tersebut.

(8) Meridian dan AmTrustee mempunyai peranan atau kewajipan bersama, atau kebalikan bahawa dana MAA/Zurich dilindungi dan dilaburkan untuk membawa pulangan kepada MAA/Zurich. Mahkamah Tinggi telah memutuskan bahawa Ong telah 'melakukan tindakan sah secara tidak sah' dan bertanggungan secara vikarius kepada tindakan-tindakan fraud yang berkait kepada Meridian. Mahkamah telah menggunapakai prinsip undang-undang yang betul dan telah mengarahkan dengan betul kepada fakta-fakta dalam isu dalam perkara tersebut. Keputusan bahawa Meridian adalah bertanggungan secara vikarius bagi tindakan-tindakan salah Ong adalah juga konsisten dengan keputusan dalam kes KWAP.

(9) Ujian 'but for' berkaitan dengan penyebaban/sumbangan terhadap sebab kerugian bukan satu-satunya ujian atau ujian eksklusif untuk digunapakai. Apabila beberapa faktor telah membawa kepada kerugian, ia adalah kewajipan mahkamah untuk memberikan pertimbangan kepada apa sumbangan material yang dibuat oleh faktor-faktor secara berasingan dan membahagikan tanggungjawab dengan sewajarnya,

asalkan ia memenuhi ujian utama 'proximate causation'. Mahkamah Tinggi telah dengan betul memutuskan bahawa di mana arahan kedua daripada Ong mempunyai kesan membatalkan arahan pertama, dan malahan menyamarkannya, AmTrustee dan pekerja-pekerjanya tidak wajar menurut automaton melakukan perintah Meridian. Pekerja-pekerja AmTrustee telah menyedari sesuatu yang tidak betul tetapi telah diperdaya untuk menerima penjelasan Ong; pekerja-pekerja tersebut dan pegawai-pegawai lain yang bertanggungjawab sepatutnya bertindak dengan bertanggungjawab, mengetahui sepenuhnya bahawa benefisiari utama dana-dana tersebut adalah MAA/Zurich.

(10) Oleh itu, hakim bicara tidak terkhilaf dan betul dalam pembahagian liabiliti yang dibuatnya antara Meridian dan AmTrustee setakat yang berkaitan dengan kerugian yang boleh diperolehi semula oleh MAA/Zurich dan KWAP. Juga tidak ada alasan yang sah atau munasabah untuk mengganggu kadar pembahagian yang diperintahkan oleh hakim bicara dalam perkara tersebut.

Case(s) referred to:

Bartlett & Others v. Barclays Bank Trust Co Ltd [1980] 1 All ER 152 ***(refd)***
Caparo Industries Plc v. Dickman [1990] 2 AC 605 ***(foll)***
Chua Seng Sam Realty Sdn Bhd v. Say Chong Sdn Bhd & Ors And Other Appeals [2012] 7 CLJ 337 CA ***(refd)***
CIMB Bank Bhd v. Maybank Trustees Bhd & Other Appeals [2014] 3 CLJ 1 FC ***(refd)***
Dato' See Teow Chuan & Ors v. Ooi Woon Chee & Ors And Other Appeals [2012] 2 CLJ 535 CA ***(refd)***
Donoghue v. Stevenson [1932] AC 562 HC ***(refd)***
Hedley Byrne & Co. v. Heller & Partners [1963] 2 All ER 575 ***(refd)***
Lister v. Hesley Hall Ltd [2001] 2 All ER 769 ***(refd)***
Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors [2006] 2 CLJ 1 FC ***(foll)***
Maslinda Ishak v. Mohd Tahir Osman & Ors [2009] 6 CLJ 653 CA ***(refd)***
Sivalingam Periasamy v Periasamy & Anor [1996] 4 CLJ 545 CA ***(refd)***
Solid Investments Ltd v. Alcatel Lucent (Malaysia) Sdn Bhd [2014] 3 CLJ 73 FC ***(refd)***
Tengku Abdullah ibni Sultan Abu Bakar & Ors v. Mohd Latiff Shah Mohd & Ors And Other Appeals [1997] 2 CLJ 607 CA ***(refd)***
The Co-operative Central Bank Ltd v. KGV & Associates Sdn Bhd [2008] 2 CLJ 545 FC ***(refd)***
Wu Siew Ying v. Gunung Tunggal Quarry & Construction Sdn Bhd & Anor [2011] 1 CLJ 409 FC ***(refd)***

Legislation referred to:

Securities Industry Act 1983, s. 47C(1)
Trust Companies Act 1949, s. 8(1)(f)

(Civil Appeal No: W-02-1113-05-2013)
For the appellant - Kelvin Seet Wan Nam (Yap Mong Jay & Verene Tan Yeen Yi with him); M/s Cheang & Ariff
For the respondent - Lim Kian Leong (Tan Wei Wei & Kenneth Liew Vui Khen with him); M/s Lim Kian Leong & Co

(Civil Appeal No: W-02-1156-05-2013)
For the appellant - S Sivaneindiren (Puteri Shehnaz Majid with him); M/s Cheah, Teh & Su
For the respondent - Lim Kian Leong (Tan Wei Wei & Kenneth Liew Vui Khen with him); M/s Lim Kian Leong & Co
- Kelvin Seet Wan Nam (Yap Mong Jay & Verene Tan Yeen Yi with him); M/s Cheang & Ariff

(Civil Appeal No: W-02-1160-05-2013)
For the appellant - Kelvin Seet Wan Nam (Yap Mong Jay & Verene Tan Yeen Yi with him); M/s Cheang & Ariff
For the respondent - S Sivaneindiren (Puteri Shehnaz Majid with him); M/s Cheah, Teh & Su
- Lim Kian Leong (Tan Wei Wei & Kenneth Liew Vui Khen with him); M/s Lim Kian Leong & Co

[Appeal from High Court, Kuala Lumpur; Civil Suit No: D3-22-1797-2005]

Reported by S Barathi

JUDGMENT

Varghese George JCA:

Introduction And Brief Overview

[1] The appeals W-02-1156-05/2013, W-02-1113-05-2013 and W-02-1160-05-2013 originated from civil suits.

(a) Kuala Lumpur High Court Guaman Sivil No: D3-22-102-2006 by *Malaysian Assurance Alliance Bhd v. AmTrustee Berhad*. Meridian Asset Management Sdn Bhd was included as a third party at the instance of AmTrustee Bhd and subsequently Malaysian Assurance Alliance Bhd proceeded to add Meridian Asset Management Sdn Bhd as the second defendant to the main suit as well; and

(b) Kuala Lumpur High Court Guaman Sivil No: D3-22-1797-2005 by *Meridian Asset Management Sdn Bhd v. AmTrustee Berhad*.

[2] Malaysian Assurance Alliance Bhd ("MAA") has since changed its name to Zurich Insurance Malaysia Berhad ("Zurich"). AmTrustee Bhd and Meridian Asset Management Sdn Bhd will be referred to as AmTrustee and Meridian respectively.

[3] Zurich, *vide* a letter of authority (LOA) dated 9 October 1998 had appointed Meridian as its external fund manager for the purpose of investment of its insurance funds. Meridian, by a custodial services agreement dated 13 October 1998 (CSA), appointed AmTrustee to perform custodial and administrative functions in respect of the Zurich insurance funds managed by Meridian. Between 1998 and 2002, a total of RM145 million was placed by Zurich with Meridian:

(a)	MAA Life Non Par Account	RM 15,000,000.00
(b)	MAA Annuity Par Account	RM 53,000,000.00
(c)	MAA Life Par Account	RM 77,000,000.00
	Total	RM145,000,000.00

[4] Between 20 June 2002 and 30 December 2004, one Ong Cheng Hoe, then an employee of Meridian caused to be transferred a total of RM33,248,000 belonging to Zurich to his personal trading accounts with TA Futures Sdn Bhd, a futures broking house (TA Futures). He did so by issuing written instruction purportedly from Meridian to AmTrustee to transfer Zurich's funds to his said personal trading account in TA Futures. This was accomplished by a cut and paste of the signature of one Nicholas Ng Tiong Gee (Nicholas), the managing director of Meridian onto the letter-head of Meridian and faxing that letter to AmTrustee. There were 28 such transfers in all.

[5] AmTrustee acted on each of those instructions and made the transfers accordingly. But AmTrustee did not record the transfers in any of its portfolio valuation reports. Instead, as instructed by Ong Cheng Hoe, the transfers were recorded as cash placements with Amanah Short Deposits (ASD), a financial institution.

[6] The actions of Ong Cheng Hoe was discovered in August 2005 when he went on medical leave. Ong Cheng Hoe and two others were tried and convicted by the Sessions Court on charges brought against them for cheating/criminal breach of trust.

[7] In Kuala Lumpur High Court Guaman Sivil No: D5-22-1457-2007, Kumpulan Wang Persaraan (Diperbadankan) (KWAP), affected by two wrongful payments out similarly carried out by Ong Cheng Hoe, the High Court found Meridian vicariously liable for the actions on Ong Cheng Hoe and entered judgment against Meridian in favour of KWAP.

[8] In Kuala Lumpur High Court Guaman Sivil No: D3-22-102-2006, the pleaded cause of action by Zurich against AmTrustee was in (i) negligence and (ii) for breach of fiduciary duty; and against Meridian on a claim for breach of trust. From the High Court's decision in D3-22-102-2006:

(a) Meridian did not appeal against the High Court finding that Meridian was vicariously liable for the wrongdoing of its ex-employee, Ong Cheng Hoe;

(b) By Civil Appeal No: W-02-1156-05/2013 before us, Zurich appealed against the dismissal by the High Court of Zurich's claim against AmTrustee on the grounds that there was no 'breach of fiduciary duty' and/or any 'breach of duty of care' on the part of AmTrustee to Zurich

since AmTrustee acted on Meridian's instructions and reporting to Meridian. It was also observed by the High Court that the loss suffered by Zurich was in any event too remote to be imposed upon AmTrustee and in any event that Zurich had secured a judgment against Meridian for the sum claimed; and

(c) By Civil Appeal No: W-02-1160-05/2013 before us, Meridian appealed against the rejection of its counter-claim for full contribution or indemnity against AmTrustee in respect of the Zurich funds, and granting instead apportionment as between Meridian and AmTrustee in the proportion 60% to 40%.

[9] In Kuala Lumpur High Court Guaman Sivil No: D3-22-1797-2005, Meridian sought full contribution or indemnity against AmTrustee in respect of Zurich's and KWAP's funds. By Civil Appeal No: W02-1113-05/2013 before us, Meridian appealed against the apportionment by the High Court of liability between Meridian and AmTrustee in the proportion of 60% to 40%.

[10] In short Zurich, as did KWAP earlier, had sued AmTrustee and Meridian for 'breach of fiduciary duty' and/or any 'breach of duty of care' (negligence) on the part of AmTrustee, and Meridian sought full contribution or indemnity from AmTrustee.

Our Deliberation

Appeal No: W-02-1156-05/2013

[11] From our reading of the grounds of judgment, the learned judge had taken a rather unduly restricted approach and placed much emphasis on the lack of contractual nexus between Zurich and AmTrustee on both the principal issues, namely (i) whether there was a duty of care owed by AmTrustee to Zurich and (ii) whether AmTrustee stood in the position of a 'fiduciary' to Zurich.

[12] This was obvious when in addressing the issue of 'duty of care' owed by AmTrustee to Zurich, the learned judge phrased the question before the court in this manner - "Does AmTrustee owe a duty of care to MAA when MAA is not its client and its client is actually Meridian?"

In our view this expressed starting point was in itself flawed as the law on general duty of care were the tests as laid down in *Caparo Industries Plc v. Dickman* [1990] 2 AC 605 and accepted by our Federal Court in *Majlis Perbandaran Ampang Jaya (MPAJ) v. Steven Phoa Cheng Loon & Ors* [2006] 2 CLJ 1.

[13] The threshold tests to be satisfied to determine whether a duty of care existed were:

(i) whether the damage suffered by the plaintiff is one that is reasonably foreseeable;

(ii) whether there is a relationship of proximity between the plaintiff and the defendant; and

(iii) whether it is fair and reasonable that the defendant should owe the plaintiff a duty of care.

[14] We agree with counsel for Zurich that following *Caparo*'s decision, the English courts had developed a dual approach in respect of negligence cases, namely:

(i) the 'categorisation approach' - whether the plaintiff's claim falls within a recognised category of liability; and

(ii) the 'open-ended approach' - where even if the facts of a particular case do not come within a recognised category of liability, the courts could go further to determine if a duty of care should nevertheless arise on the facts.

In Australia, New Zealand and Singapore, the courts have also approved and adopted the 'open-ended approach'.

[15] The Federal Court in *MPAJ*'s case noted that:

> ... the critical question is not the nature of the damage itself, whether physical or pecuniary, but whether the scope of duty in the circumstances of the case is such as to embrace damage of the kind which a plaintiff claims to have sustained.

[16] The Federal Court in the subsequent case of *The Co-operative Central Bank Ltd v. KGV & Associates Sdn Bhd* [2008] 2 CLJ 545, once again endorsed the position that it was the detailed facts and circumstances of a particular case and the particular relationship between the parties that were critical in determining whether or not a duty of care existed.

[17] With reference to such an enquiry, it was our view that the following facts and matters in evidence were material and ought to have been considered by the court in its proper perspective:

(a) AmTrustee was a trust and fiduciary service provider. AmTrustee was also a registered trust company under the Trust Companies Act 1949 (TCA) whose object outlined in TCA, *inter alia* included to being a 'custodian on such terms as are agreed upon' of any monies entrusted to them. (s. 8(1)(f) of TCA);

(b) In 1996 the then Securities Industry Act 1983 (SIA) was amended to introduce a statutory requirement on a fund manager to appoint a custodian bank to maintain a trust account for all client's monies with the fund manager (s. 47C(1) of SIA).

In 2003, the SIA was further amended to introduce the definition of 'custodian' in relation to a client of a fund manager. The 'custodian' was to be a licensed bank, a licensed finance company, a license merchant

bank (as defined in the Banking and Financial Institutions Act, 1989) appointed by the fund manager with the prior written consent of the client.

(The SIA was repealed and replaced with the Capital Markets and Services Act, 2007 which contains similar provisions as in the SIA on the appointment of a custodian bank);

(c) AmTrustee's appointment was done with the consent of MAA (Zurich). This was borne out by the addendum issued to the LOA dated 19 May 2003;

(d) AmTrustee was always aware that it was dealing with MAA/Zurich's monies. The portfolio valuation reports contained references to MAA as the trust account holder and in each account movement report, this was prominently stated on the top left-hand corner of each page;

(e) All of AmTrustee's witnesses (Mat Rizuan, Maslina Senin, Mary Abu) had in cross-examination admitted that they knew they were dealing with MAA/Zurich's funds.

Mat Rizuan who was in charge of generating the monthly reports, admitted that all material times, he was aware that the reports prepared by the AmTrustee were ultimately for MAA/Zurich;

(f) Coupled to this was the fact that MAA/Zurich had a say in the manner in which the reports were prepared by AmTrustee (see correspondence - letter dated 8 December 2003 from Meridian to AmTrustee, letter dated 20 November 2003 from Meridian to AmTrustee enclosing MAA's letter to Meridian of 7 November 2003 and letter of 4 October 2005 from MAA to Meridian); and

(g) AmTrustee's custodian fees were paid by MAA/Zurich and was effected by deduction from releases the trust accounts (as reflected in the monthly portfolio valuation reports).

[18] The statutory requirement to have a custodian bank (an outside party) in a commercial arrangement between a fund manager and their client was obviously to safeguard the assets of the client. This, without a doubt, was to ensure another level of client-asset protection beyond the immediate fund manager and was provided for by a specific legislation to that effect. In the situation at hand, AmTrustee and its employees have been shown to be fully in the know that the funds in question placed with AmTrustee as 'custodian' belonged to MAA/Zurich.

[19] In the premises as highlighted above, in our assessment there was no denying the fact that MAA/Zurich was a person so closely and directly affected by AmTrustee's acts or omissions. In the circumstances even if it may be argued that MAA/Zurich was not strictly a 'neighbour' in law within

the relationship in the cases of *Donoghue v. Stevenson* [1932] AC 562 (HC) and *Hedley Byrne & Co. v. Heller & Partners* [1963] 2 All ER 575 (HL), here more significantly the relationship was such that it satisfied the three criteria expounded further in *Caparo* as endorsed by our Federal Court in the *MPAJ*'s case. There was definitely a duty of care owed by AmTrustee to Zurich on the detailed facts and particulars and the relationship centered on Zurich's fund in the hands of AmTrustee, namely applying the 'open-ended approach'.

[20] It was therefore clear to us that the learned judge had not only misdirected himself on the principles of law to be applied but also had misappreciated the evidence that had been placed before the court, when the court came to the conclusion that there was no duty of care owed by AmTrustee to MAA/Zurich in the circumstances of the facts in this case.

[21] The learned judge, with respect, in our view, had addressed his mind and given emphasis to an irrelevant consideration, namely that Zurich had no direct 'contractual' relationship with AmTrustee, that AmTrustee was not under a contractual duty to report to MAA/Zurich but only to Meridian, and further that MAA/Zurich was never in a position to make inquiries with AmTrustee on the status of its monies or to instruct AmTrustee directly.

[22] In a sweeping statement the learned judge also said that the reports prepared by AmTrustee were not the kind that MAA/Zurich would rely on. His Lordship's judgment was as follows:

> The evidence of PW1 on behalf of MAA is clear. MAA gave complete discretion to Meridian to invest in whichever investment will yield an optimum return. The report even if given in the current format of reporting which AmTrustee gave to Meridian is not the kind of report that PW1 said MAA had relied on and that had caused the loss it now claims. As MAA had given complete discretion to Meridian with respect to where to invest, it does not quite matter and indeed the evidence of PW1 viewed as a whole was that there was no(t) a hint of MAA having relied on the disclosure that some of its funds were invested with TA Futures when it was not supposed to be or that it was reflected as with ASD when it was in reality not there. In other words the concern of MAA was on the more than average returns on the investments of its funds by Meridian and nothing whatsoever with AmTrustee's reporting to Meridian even if it was discovered that the report from AmTrustee to Meridian had contained dummy transactions. That would be relevant between Meridian and AmTrustee *inter se* in as much as it would not be relevant between MAA and AmTrustee.
>
> AmTrustee was also not aware that Meridian at its end would 'cut and paste' its report to MAA and any report from AmTrustee was given to Meridian for Meridian's consumption only. It would be reasonable for AmTrustee to think and assume that Meridian would look at the investment of MAA as whole before sending a comprehensive report to MAA. AmTrustee has no control over Meridian with respect to the kind of report that Meridian would send to MAA ...
>
> (emphasis added)

[23] Firstly, PW1 (Chen Kim Loong) never said any of those things attributed to him by the learned judge. When cross-examined by counsel for AmTrustee, this witness testified in the following manner:

Lim Kian Leong

Would you agree that AmTrustee, I use names, AM Trustee did not issue any reports directly to MAA?

PW1: Chen Kim Leong

The issues, My Lord, what you referring to is they actually delivered the report from AmTrustee to MAA.

Lim Kian Leong

Whether AmTrustee actually delivered, yes, report ...

PW1: Chen Kim Leong

No. They do not deliver.

Lim Kian Leong

Yeah. So, to your knowledge, would you agree that all ... any reports from any transactions, and they ... they are all in those bundles, they were given by AmTrustee to Meridian?

PW1: Chen Kim Leong

Yes

Lim Kian Leong

And then based on your knowledge of the transactions, Meridian would then have the duty or the obligation to then report to you, is that correct?

PW1: Chen Kim Leong

No. Because then the report that's issued by AmTrustee, they will bind it up. With a cover of Meridian and they will send it to us.

Lim Kian Leong

Yes. That's ... that's what ...

PW1: Chen Kim Leong

So, basically the ... that report comes directly from AmTrustee.

YA Tuan Lee Swee Seng

So, you're saying the report is bound by D2 and sent to Plaintiff, yeah?

PW1: Chen Kim Leong

Yup

YA Tuan Lee Swee Seng

But you consider that report as coming from ... A

PW1: Chen Kim Leong

Yeah

YA Tuan Lee Swee Seng

... AmTrustee, D1? B

PW1: Chen Kim Leong

Hmm.

Further when re-examined, this witness was emphatic that the report prepared by AmTrustee was for the ultimate benefit of MAA/Zurich. Please C see:

Puteri Shehnaz

Now Mr Lim also suggested to you, Mr Chen that there is no obligation on AmTrustee to report to you, your answer was 'yes'. D

PW1: Chen Kim Leong

Yes

Puteri Shehnaz

Now isn't it true that the report that they prepared is for the ultimate benefit of MAA? E

PW1: Chen Kim Leong

Yes

[24] The learned judge had overlooked this part of evidence before the F court, or had misread it. It defies logic, and reasonableness to construe that any report prepared by AmTrustee for Meridian with respect to MAA/Zurich monies held by AmTrustee as custodian, would not end up with MAA/Zurich and/or it would not be relied upon by MAA/Zurich, albeit transmitted through Meridian, the fund manager concerned. The G learned judge's observation reproduced above are mere arguments based on conjectures and assumptions when actual evidence and common sense would dictate a contrary position. In our view, the learned judge was way off the mark to hold - "For all intents and purposes, the reports were prepared for the eyes of Meridian only". Nothing could be further from the truth if there H had been a proper appreciation of the testimony before the court as set out above.

[25] On the materials placed before the court there was undisputed evidence that AmTrustee had breached the duty of care they owed to MAA/Zurich. As the custodian bank, AmTrustee had a duty to report I accurately the movements of MAA/Zurich's funds in the trust accounts such that AmTrustee's reports truly reflected the status of the movement of funds

A left in the trust account at any given point of time. Even assuming that AmTrustee were obligated to transfer funds to TA Futures (as per the first instructions of Meridian), it must be highlighted here that AmTrustee had misrepresented the actual state of things when in their reports it was stated that the sums transferred out were invested as cash placements with ASD -
B which AmTrustee knew all along that this had never been done since they themselves (AmTrustee) had as a matter of fact transferred it to TA Futures.

[26] AmTrustee's witnesses, Maslina Senin and Mary Abu who took instructions from Ong at different points in time and Norizan Jalil, AmTrustee's Business Executive, conceded that the instruction from Ong to
C record the transfers to TA Futures as cash placements with ASD did appear to them to be dubious, unusual and improper but nevertheless had yet proceeded to act on those instructions. AmTrustee's reports also claimed falsely that the such 'dummy placements' with ASD were even earning interest where such was not the situation at all.

D **[27]** AmTrustee's attempt to shield themselves behind cl. 13 of the CSA (which provided that AmTrustee was entitled to assume the genuineness of instruction received from Meridian) could not in our view, explain away the false reporting by AmTrustee that the monies paid out were invested as cash placements with ASD (and that too, it was 'earning interest').

E **[28]** It is also pertinent to note that it was always open to AmTrustee to refuse to act on any instructions issued by Meridian under the terms of cl. 11 of the CSA. Clause 11 was in the following terms:

> 11. Refusal To Act
>
> F (a) The Custodian shall act in accordance with the instructions of the Company **to the extent permitted by law** and shall be entitled (subject to notice having been given to the Company) to **refuse to act** on any instruction by the Company *if in the opinion of the Custodian any liability (whether present, future or contingent) may be incurred by the Custodian* to any person pursuant to its performance of duties
> G hereunder.
>
> b) The Custodian **shall not incur liability by refusing to act in good faith** to perform any function or obligation herein which in its judgment is improper or unauthorised ...
>
> H (emphasis added)

AmTrustee was entitled in our view to refuse to act on such instruction (from Meridian) if, in its opinion, any liability (whether present, future or contingent) may be incurred by AmTrustee to any person and further if in AmTrustee's judgment, any such payment was improper or unauthorised.

I **[29]** Without any doubt there was an obligation incumbent upon AmTrustee to be alert and to make a judgment call if there existed circumstances such to cause suspicion that the instructions were not made in

good faith; otherwise AmTrustee ran the risk of being liable for the losses caused to a proximate - 'any person' which in this case encompassed MAA/Zurich whose funds, as was known to AmTrustee all along, was the subject of the wrongful instructions of Ong. The situation was compounded further by the subsequent false reporting that the moneys transferred out were deposited as cash placements with ASD (the non-existent dummy transaction).

[30] With that we now turn to the issue whether AmTrustee stood in a fiduciary position to MAA/Zurich with respect to the custody of the funds placed with them by Meridian.

The learned judge's position appeared to be that AmTrustee's possession of the funds was merely by virtue of its appointment by Meridian (and not MAA) and under the terms of the CSA; AmTrustee was just a bare custodian who had to follow Meridian's instruction.

[31] In our assessment, in coming to such a conclusion that AmTrustee owed no duty to MAA/Zurich as a fiduciary, the learned judge had, with respect, misappreciated important and established principles of law as to the genesis of fiduciary obligation owed by one to another, as enunciated in decisions of our courts.

A fiduciary relationship arose where one undertook to act for or on behalf of another in a particular endeavour and it is immaterial whether the undertaking is captured in a contract or not or whether it is gratuitous or assumed without request. (Court of Appeal in *Dato' See Teow Chuan & Ors v. Ooi Woon Chee & Ors And Other Appeals* [2012] 2 CLJ 535). The nature of the fiduciary relationship would determine the exact extent and scope of the fiduciary's duty or obligations.

[32] In a recent decision, the Federal Court in *Solid Investments Ltd v. Alcatel Lucent (Malaysia) Sdn Bhd* [2014] 3 CLJ 73 considered a previous decision of the Court of Appeal in *Tengku Abdullah ibni Sultan Abu Bakar & Ors v. Mohd Latiff Shah Mohd & Ors And Other Appeals* [1997] 2 CLJ 607, and also with reference to other Australian and English authorities, held that as a matter of law:

> a fiduciary could be found on the facts rather than a contract and the court ought to apply a flexible approach in ascertaining whether a fiduciary relationship exists in a given circumstances.

[33] The Federal Court in *Solid Investment*, agreed with the Court of Appeal's observations in *Tengku Abdullah*'s case that whether a particular set of circumstances ought to attract a fiduciary duty was a question of judicial policy which depends on the standard of commercial morality that the courts of a particular jurisdiction may choose to impose having regard to relevant local considerations. Also to be appreciated was the underlying premise that the imposition of fiduciary obligations arose in equity.

[34] It behoves repetition here that the appointment of AmTrustee as custodian by Meridian was required (and regulated) by statute to further safeguard MAA/Zurich funds placed with Meridian as fund manager. As also highlighted earlier AmTrustee possessed at all times sufficient scope for independent exercise of discretion or power with respect to instruction related to the known funds of MAA/Zurich within their custody, irrespective of whatever instructions emanating for Meridian thereto.

[35] AmTrustee was a trustee company and it owed a higher duty to ensure that the assets of the fund manager's with them were adequately protected and the ultimate beneficiary's interests were not jeopardised.

In *Bartlett & Others v. Barclays Bank Trust Co Ltd* [1980] 1 All ER 152 which was an action against a trust corporation for breach of trust, the court held that a professional corporate trustee, such as the defendant bank there, owed a higher duty of care and was liable for loss caused by neglect to exercise the special care and skill which it professed to have and expected to exercise to safeguard the beneficiaries.

[36] It was our considered view therefore, that considering all circumstances of the matter, AmTrustee stood in the position of a fiduciary directly to MAA/Zurich in respect of MAA/Zurich's funds deposited with AmTrustee as statutory 'custodian' by Meridian. AmTrustee was also not a 'bare trustee'; a charge or commission of 0.02% of the value of each transaction was paid (by way of deduction) by MAA/Zurich to AmTrustee quite apart from another charge separately imposed and recovered by Meridian from MAA/Zurich (at the rate of 0.25%). In summary there was a relationship of 'trusted confidence' existent between MAA/Zurich and AmTrustee at all material times in the context of the funds of MAA/Zurich handled by AmTrustee as 'custodian'.

[37] The appellate court had a duty to intervene where a trial court is shown to have so fundamentally misdirected itself, such as one may say that no reasonable court which had properly addressed itself to the facts and had asked the correct questions would have arrived at the same conclusion. (*Sivalingam Periasamy v. Periasamy & Anor* [1996] 4 CLJ 545; [1995] 3 MLJ 395 CA). For the reasons discussed above this was one such case that merited our interference.

Duty, Breach, Damages

[38] As discussed above AmTrustee therefore owed both a duty of care and was in a position of a 'fiduciary' to MAA/Zurich. There was no serious dispute taken that the duty of care and fiduciary obligation owed to MAA/Zurich had been breached by AmTrustee and damages had ensued to MAA/Zurich. This was adequately borne out by the adjustments made by AmTrustee themselves to their portfolio valuation reports following

discovery of the fraud in August 2005. The revised fund flow reports in respect of MAA life par and MAA annuity par account issued by AmTrustee clearly evidenced the losses occasioned to MAA/Zurich.

[39] It needs to be emphatically stated that the contention of counsel for AmTrustee that the 'fraud began and ended with Meridian' (meaning Ong's action) was not sustainable either in law or on the facts placed before the court at the trial. AmTrustee was therefore, in our assessment, severally liable with Meridian that is, for the losses suffered by MAA/Zurich.

Appeal No: W-02-1113-05-2013

Appeal No: W-02-1160-05-2013

[40] To simplify and put in perspective the issues that arise for determination from these two appeals, it needs be set out at the outset what were the respective contentions of the rival parties, namely Meridian and AmTrustee.

[41] It was argued for Meridian that the High Court was wrong in holding that Meridian was vicariously liable for the fraudulent acts of Ong. It was contended that given that statutory context behind AmTrustee's appointment as 'custodian', Meridian was barred from having absolute control and discretion with respect to the funds with AmTrustee and by cl. 11 of CSA, AmTrustee was required to act in good faith and entitled to refuse to act on any written instructions issued by Meridian if a beneficiary's interest was likely to be jeopardised.

Following from this it was submitted that the effective or dominant (or even proximate) cause of the loss (to Zurich/MAA and KWAP) was AmTrustee's wrongdoing, which, according to this line of argument advanced, superseded the initial tortious act of Meridian's employees (that is even so conceding). Accordingly Meridian ought not to be imposed with any liability for the loss caused to MAA/Zurich or KWAP. (It need to be noted here that these arguments were advanced in the context of the cross-appeals with respect to apportionment of liability between Meridian and AmTrustee; as pointed out earlier there was no direct appeal by Meridian against the finding of the High Court that Meridian was vicariously liable for the losses occasioned to Zurich/MAA).

[42] AmTrustee's contention, on the other hand, was that the fraud emanated from within Meridian and was caused by Meridian's own negligence. AmTrustee was only under a duty to prepare and send its periodic reports and statements to Meridian and it was obligatory upon Meridian to scrutinise and verify the same.

It was also argued that both the first instruction and the second instruction had been given by Ong and the impugned transactions had taken place over a period of three years without any complaint being raised by Meridian to AmTrustee.

[43] Much emphasis was placed by AmTrustee on the testimony of Meridian's Nicholas (PW2 - Ng Tiong Yee) under cross-examination as follows:

Firstly, from the following excerpt:

> Lim Kian Leong
>
> So you would agree with me that actually, you trusted Ong to deal with AmTrustee on virtually all matters, in fact all matters?
>
> You trusted him.
>
> PW2: Ng Tiong Yee
>
> Uh ... I believe so.

and secondly:

> Lim Kian Leong
>
> ... ask yourself did you ask yourself when you looked at the nine entries in the daily report, did I really place 1.5 million of MAA's money with ASD?
>
> PW2: Ng Tiong Yee
>
> ... Uh-huh ...
>
> Lim Kian Leong
>
> Did you ask yourself that question?
>
> PW2: Ng Tiong Yee
>
> Uh ... I may have overlooked it.
>
> Lim Kian Leong
>
> So what's your reaction to that? Is it alright for you to overlook it?
>
> PW2: Ng Tiong Yee
>
> Uh ... should not be.

and thirdly:

> Lim Kian Leong
>
> So now based on your answer, would you agree with me that anyone in Meridian checking AmTrustee's report against your confirmation from Amanah Short Deposit would know immediately that actually there is problem. These two alleged deposits placements with Amanah Short did not happen because ASD did not confirm them.
>
> PW2: Ng Tiong Yee
>
> Correct.
>
> Lim Kian Leong

Correct. And then when could this have taken place? When could this realisation have taken place?

PW2: Ng Tiong Yee

The very first transaction, My Lord.

Lim Kian Leong

The very first transaction.

PW2: Ng Tiong Yee

Yes

Lim Kian Leong

Yes. So, if somebody in Meridian have checked and realised, the very first transaction, this whole 28 or 30 incidents would never happen, right?

PW2: Ng Tiong Yee

Correct.

Lim Kian Leong

Yes. Yes. And I put it to you, Mr. Ng, that that is the reason ... that is the real reason you have not revealed this fact clearly to any of the three courts in which you have appeared, the fact being that Meridian actually receives direct confirmations from ASD. That is the real reason you've not revealed it because you know very well anyone looking at it will know immediately Meridian could have stopped it.

PW2: Ng Tiong Yee

Yes.

YA Tuan Lee Swee Seng

Do you agree?

PW2: Ng Tiong Yee

Sorry?

YA Tuan Lee Swee Seng

You agree?

PW2: Ng Tiong Yee

Yeah, we could have stopped it yeah if it was ...

[44] It was therefore highlighted by AmTrustee that Meridian themselves also received reports from ASD for all placements made by Meridian with ASD. Nicholas had confirmed this. Hence, it was submitted that, if Meridian had cared to check the AmTrustee's reports against the ASD reports, Meridian would have been able to detect the discrepancies. All this pointed to, it was argued, a reasonable inference that Meridian had not on their part

checked the relevant reports furnished by ASD and if so done, the fraudulent acts/intentions of Ong could have been stemmed out right from the beginning.

[45] It was therefore AmTrustee's submission that even if AmTrustee was found negligent in carrying out its duties, the chain of causation arising from AmTrustee's breach of duty had been broken by the subsequent negligence of Meridian and Meridian ought be held to be solely liable for the losses as opposed to the apportionment of liability that had been ruled by the learned judge as between them.

[46] For completeness, it must also be stated that it was Meridian's contention that the second instruction (namely, that records to be shown as 'placement with ASD') was not given in writing and AmTrustee had acted on the verbal instructions of Ong's; this it was contended had the effect of cancelling out the first instruction, even if the first instruction was held to be a proper and valid instruction by Meridian to AmTrustee.

[47] The Court of Appeal in *Chua Seng Sam Realty Sdn Bhd v. Say Chong Sdn Bhd & Ors And Other Appeals* [2012] 7 CLJ 337; [2013] 2 MLJ 29 reaffirmed and expressed the requirement incumbent upon a plaintiff/claimant to establish the causative link between the act complained of and the injury or damages caused in the following terms:

> It is trite law that in an action for negligence the plaintiff has to prove that the defendant's act was the effective cause of the injury suffered by the plaintiff. Without a causative link being established by the Plaintiff, the claim cannot succeed. The passage found in para 2-01 of the text of Clerk & Lindsell on Tort (20th Ed), states this basic principle in the following manner:
>
> > In the majority of torts the claimant must show that the defendant's wrongdoing caused him actual damage. In these torts, and indeed in torts actionable *per se* if substantial damages are sought the claimant must establish that:
> >
> > (1) The defendant's conduct did in fact result in the damage of which he complains; and
> >
> > (2) The damage is not in law too remote a consequence of the defendant's wrongdoing.
>
> As such, the plaintiffs are duty bound to prove that it was the defendants' act which caused the damage and that the damage caused is not too remote to the defendants' act.

[48] However, the Federal Court in *Wu Siew Ying v. Gunung Tunggal Quarry & Construction Sdn Bhd & Anor* [2011] 1 CLJ 409; [2011] 2 MLJ 1 had this to say about a situation where there was more than one possible cause of the plaintiff's/claimant's injury:

> In establishing this link between wrongdoing with injury there can be other possible causes. In such a situation, some courts have adopted the 'but for' test. Here the approach is not to identify all the possible causes of a particular incident but focus on the effective cause of the resulting damage in order to assign responsibility for that damage caused. As confirmed by the authoritative text of Clerk & Lindsell on *Tort* (17th Ed) at paras 2-12, in majority of the cases this 'but for' test in practice operates well. *But in situations where there are combined causes or several causes contributing to the wrongdoing then this 'but for' test may not be a satisfactory approach to determine causation.*
>
> ...
>
> In the light of these authorities, **we are of the view that the 'but for' test is not the exclusive test to be applied to determine causation of the injury.** It can still be applied *but not in circumstances when there are two or more acts or events or factors that could or contribute to the injury of the plaintiff.* This instant case is a case in point where evidence is established that there are a **multiple of factors** that could bring about the injury to the plaintiff. And *to decide whether there is causation in these circumstances the approach of Lord Reid in Bonnington Casting Ltd v. Wardlaw: whether any of these acts or events of factors has materially contributed to the plaintiff's injury should be adopted. What is a material contribution must be a question of degree. This is for the court to decide but certainly anything that is trifle is not material …*
>
> (emphasis added)

[49] We have revisited the material factual matrix involved in this case as discussed earlier and in particular the respective obligations of Meridian and AmTrustee with respect to MAA/Zurich's funds entrusted to them to hold and/or to manage. Essentially, it cannot be denied that they had a joint if not complimentary role or duty to ensure that MAA/Zurich funds were protected and invested to bring in returns for MAA/Zurich (the beneficiary).

[50] On the authority of cases like *Lister v. Hesley Hall Ltd* [2001] 2 All ER 769 and our Court of Appeal's decision in *Maslinda Ishak v. Mohd Tahir Osman & Ors* [2009] 6 CLJ 653, the question whether an employer (like Meridian here) would be vicariously liable for acts of its employee (like Ong) would very much depend on the particular and peculiar facts of each case. It was held by the learned judge that Ong was the 'face of Meridian' and had the ostensible authority to issue the instructions, as he did, to AmTrustee. In short it was held that Ong had 'done a lawful act unlawfully' and vicarious liability for those fraudulent actions (which has resulted in loss to MAA/Zurich) without a doubt, attached to Meridian.

[51] We did not find any reason to interfere with the learned judge's conclusion as the court had applied the right principles of law and directed itself correctly to the facts in issue in the matter. This decision that Meridian was vicariously liable for the unlawful acts of Ong was also consistent to the decision in the KWAP's case (KL High Court Suit No. 22-1457-2007).

[52] The issue then before us whether the learned judge was in law and on facts correct in attributing contributory negligence against AmTrustee for the losses suffered by Zurich, in the proportion of 40% of the amount Meridian had been found liable.

[53] On the authorities cited above, it is clear that the 'but for' test with respect to causation/contribution towards the cause of the loss was not the only or exclusive test to be applied. Where multiple factors had brought about the injury (loss) it was the duty of the court to give regard to what material contribution those factors had played separately and apportion responsibility accordingly, so long as it satisfied the overriding test of 'proximate causation'. (See: Federal Court in *CIMB Bank Bhd v. Maybank Trustees Bhd & Other Appeals* [2014] 3 CLJ 1; [2014] 3 MLJ 169 FC also involving the operations of a trust account).

[54] We have examined the grounds of the learned judge and note that the court had rightly held that where the second instruction from Ong had the effect of cancelling the first instruction and even camouflaging it, AmTrustee and its staff ought not to have been a compliant automaton doing the bidding of Meridian. The staff of AmTrustee had sensed something was not quite right but had been gullible to accept the explanation of Ong; those staff and other responsible officers ought to have acted responsibly, knowing fully well that the ultimate beneficiary of the funds was MAA/Zurich.

[55] We are in agreement with the following observations of the learned judge with reference to the particular circumstances obtaining in this case:

> 62.3 AmTrustee of course ought not to have done that as they should have smelt something rotten is about to take place. More than that in the subsequent reports to Meridian and this went on for some 30 transactions spanning over 3 years, it even carries the element of interest supposedly earned from the various placements of the monies with ASD. What is most damning is that AmTrustee have not been able to explain how that had come about though it is clear that the report had emanated from them!;
>
> 62.4 Where the fraud could not have been carried without the action or inaction of the parties entrusted to exercise due care and diligence to each other, neither can put the full blame on the other but each must own up to the extent of its culpability and liability;
>
> 62.5 Looking at Meridian, Ong being the source of the temptation, was the genesis of it all. Meridian had no proper supervision of Ong and indeed allowed him a free rein with what he did and the reports he received. Even its own internal auditors did not discover it. Mr Nicholas himself also did not exercise due diligence in ensuring that the Reports of AmTrustee were a correct reflection of the placement of funds. AmTrustee on the other hand cannot see their role as a passive automaton or robot receiving instruction and acting on it in

obedience and obeisance without even raising an eye brow when they knew or ought to have known that something was amiss. They cannot explain away the dummy transactions especially the reflection of interest earned in ASD when there was no placements of funds.

[56] We were therefore of the view that the learned judge did not err and was justified on the facts surrounding these related cases to apportion liability as he did between Meridian and AmTrustee in so far as the losses recoverable by MAA/Zurich and KWAP was concerned.

We also found no valid or any sound ground to disturb the rate of apportionment ordered by the learned judge in the matter.

Conclusion

[57] For the reasons discussed and elaborated above our unanimous decision in respect of the appeals before us therefore were as follows:

(i) Appeal No: W-02-1156-05/2013

Zurich's appeal that AmTrustee be severally liable (with Meridian) for the losses suffered by Zurich was allowed with costs.

AmTrustee's cross-appeal was dismissed.

One set of costs was awarded to Zurich.

(ii) Appeal No: W-02-1113-05/2013

Appeal No: W-02-1160-05/2013

Meridian's appeal and AmTrustee's cross-appeal in W-02-1113-05/2013 were dismissed.

Meridian's appeal in W-02-1160-05/2013 was dismissed. Meridian and AmTrustee were ordered to bear their own costs for these appeals.